RECORD AND BRIEFS

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA,
AHMER IQBAL ABBASI, ANSER MEHMOOD,
BENAMAR BENATTA, AHMED KHALIFA,
SAEED HAMMOUDA, AND PURNA BAJRACHARYA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This putative class action was filed by foreign nationals who were illegally in the United States and detained following the September 11th terrorist attacks. The FBI designated respondents as "of interest" or "high interest" to its investigation into the attacks; Bureau of Prisons policy mandated that detainees so designated be housed in the most restrictive conditions permissible. Respondents brought this action seeking to hold petitioners Dennis Hasty and James Sherman, who were the Warden and Associate Warden at the Metropolitan Detention Center, personally liable in damages, along with others. Respondents claim that Hasty and Sherman should be liable because (*inter alia*) they concluded—and thus "knew"—that *the FBI* lacked evidence to support its terrorism designations for respondents. The questions presented are:

1. Whether, as the Second Circuit held, the judicially implied cause of action for damages against individual officials recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), extends to this context.

2. Whether qualified immunity was properly denied, notwithstanding the specific circumstances confronted by petitioners—including the FBI's terrorism designations for respondents—because the Constitution "clearly" prohibits any "condition of pretrial detention not reasonably related to a legitimate governmental objective," Pet. App. 57a-58a, or imposed "because of * * * race, ethnicity, religion, and/or national origin," *id.* at 72a-73a.

3. Whether the allegations against Hasty and Sherman—such as the assertion that they "knew" the FBI's terrorism designations for respondents were wrong but imposed otherwise mandatory confinement conditions because they had discriminatory intent—are sufficiently plausible to state a claim under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court and appellees-cross-appellants in the court of appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the district court and appellants in the court of appeals.

John Ashcroft, Robert Mueller, and James W. Ziglar were defendants in the district court and cross-appellees in the court of appeals.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court but did not participate in the appeals that are the subject of this petition.

Salvatore Lopresti,[1] Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but did not participate in the appeals that are the subject of this petition.

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[1] Mr. Lopresti filed a notice of appeal but did not pay a filing fee or file a brief. His appeal was accordingly dismissed under Federal Rule of Appellate Procedure 31(c).

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but did not participate in the appeals that are the subject of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Dennis Hasty and James Sherman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-156a) is published at 789 F.3d 218 (2d Cir. 2015). The opinion of the district court (Pet. App. 157a-226a) is published at 915 F. Supp. 2d 314 (E.D.N.Y. 2013).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 17, 2015. Pet. App. 2a. It denied rehearing and rehearing en banc on December 11, 2015. *Id.* at 228a. On February 29, 2016, Justice Ginsburg extended the time to file a petition for a writ of certiorari to and including April 11, 2016. On April 4, 2016, Justice Ginsburg further extended the time to file a petition to and including May 9, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution and Title 42 of the U.S. Code are set forth in the appendix. Pet. App. 241a-243a.

PRELIMINARY STATEMENT

This *Bivens* action—sustained by the Second Circuit over a six-judge dissent from denial of rehearing en banc—arises from the detention of illegally present foreign nationals in an effort "to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a. The panel decision rests on the following premise: Presented with the FBI's national-security terrorism designations for those detainees, local prison officials were required by "clearly established law" to disregard the FBI's designations and substitute their own supposed views about the detainees' terrorism connections. For not doing so, those local jailers must face personal damages liability under *Bivens*.

The Second Circuit's decision to allow *Bivens* claims in this extraordinary context, its ruling that the allegations here meet the plausibility requirement of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and its denial of qualified immunity, all defy this Court's directives. As the panel dis-

sent and the six-judge dissent from denial of rehearing en banc explain, the decision below has spawned multiple circuit conflicts. It threatens potential havoc for crisis and national-security responses, where officers often must rely on the judgments of superior officials with superior access to national-security information. And it "raises questions of exceptional importance meriting further review." Pet. App. 232a.

STATEMENT

This putative class action was filed by foreign nationals who were in the United States illegally and detained after the 9/11 terrorist attacks. They seek damages under *Bivens* from petitioners Dennis Hasty and James Sherman ("Hasty and Sherman"), as well as former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former INS Commissioner James Ziglar (the "DOJ Defendants").

I. Proceedings In District Court

A. Respondents' Claims

Respondents were arrested on immigration charges following the 9/11 terrorist attacks. Most respondents were detained in the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Petitioners Hasty and Sherman were, respectively, the Warden and Associate Warden for Custody at MDC.[1]

Before being sent to MDC, respondents were designated by the FBI as "of interest" or "high interest" to the

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[1] Two respondents were housed in the Passaic County Jail. Hasty and Sherman had no involvement with that institution, and the Passaic detainees' claims against Hasty and Sherman were dismissed. See Pet. App. 195a n.16. Accordingly, "respondents" herein refers only to the claimants detained at MDC.

9/11 investigation. Pet. App. 294a (¶ 143), 302a (¶ 169), 307a-308a (¶ 187), 314-315a (¶ 211), 319a (¶ 226), 321a (¶ 233). Bureau of Prisons ("BOP") policy required detainees so classified to be held under "'the most restrictive and secure conditions permitted.'" *Id.* at 49a. Such detainees could not be released until the FBI affirmatively cleared them of any connection to terrorism. See *id.* at 18a; see also *id.* at 263a (¶ 55), 392a-393a, 411a-412a. Consequently, respondents were confined in the "ADMAX SHU," a special wing of MDC with particularly restrictive confinement conditions.

Respondents do not challenge their detention. Rather, they challenge the highly restrictive confinement conditions. They do not, however, claim that those conditions—referred to as "official conditions"—are *never* permissible. Respondents agree such conditions are appropriate, for example, for suspects with genuine terrorism connections. See Oral Argument at 1:36:58, *Turkmen* v. *Hasty*, No. 13-981 (2d Cir. May 1, 2014); Pet. App. 45a. But they urge it was unlawful to impose those conditions *on them* because they did not actually have terrorism connections. Pet. App. 49a-51a; see also *id.* at 270a (¶ 69), 271a (¶ 73). In essence, respondents allege that Hasty and Sherman violated respondents' "clearly established" rights because they supposedly "knew" the FBI's "of interest" designations were unfounded, and failed to disregard those designations by imposing less-restrictive conditions (in violation of BOP policy) based on their own putative views. See *id.* at 50a-56a.

Respondents also challenge unauthorized conduct by individual corrections officers—referred to as "unofficial conditions"—including verbal abuse and rough treatment. See Pet. App. 52a-55a; *id.* at 273a (¶ 77), 283a (¶ 105), 284a (¶ 109). Respondents do not claim Hasty or Sher-

man observed or engaged in such conduct. See *id.* at 52a-55a.

Of the operative Complaint's seven counts, four remain. Three assert claims under *Bivens*. Count 1 alleges that the conditions of confinement were punitive and violated due process. Count 2 asserts an equal-protection violation, alleging respondents were held in restrictive conditions based on race, ethnicity, and/or national origin. Count 6 asserts that respondents were subject to unreasonable and punitive strip searches in violation of the Fourth and Fifth Amendments. Count 7 asserts a claim under 42 U.S.C. §1985(3), alleging that Hasty, Sherman, and the DOJ Defendants conspired to violate respondents' equal-protection rights.[2]

B. The District Court's Ruling

Initial proceedings in this case culminated in remand for reconsideration in light of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). On remand, respondents filed the Fourth Amended Complaint ("Complaint"). The district court granted the DOJ Defendants' motions to dismiss, and denied Hasty's and Sherman's in relevant part. See Pet. App. 157a-226a.

1. In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court first recognized a cause of action for damages against individual officers for constitutional violations. The district court recognized that, since 1980, this Court has refused to extend *Bivens* to any new contexts. Pet. App. 212a; see *Iqbal*, 556 U.S. at 675 (*Bivens* action "disfavored").

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[2] Count 3, a free-exercise claim, was rejected on appeal. Pet. App. 27a. The dismissal of Counts 4 and 5, *id.* at 202a-211a, was not appealed, *id.* at 20a n.13.

The district court thus explained that *Bivens* will not be extended if "special factors" counsel hesitation. Pet. App. 215a-216a. "Special factors" include "'military concerns,'" "'national security concerns,'" and "'foreign policy considerations.'" *Id.* at 216a. The district court recognized that this case involves an "extraordinary factual context." *Turkmen* v. *Ashcroft*, No. 02-cv-2307, 2006 WL 1662663, at *30 (E.D.N.Y. June 14, 2006). But it ruled that there was no reason to examine whether "special factors" counseled hesitation before allowing a *Bivens* claim here because respondents' claims would not require it to "extend" *Bivens* to a "new context." Courts, it declared, had previously allowed ordinary prisoners' conditions-of-confinement and equal-protection claims under *Bivens*. See Pet. App. 184a-185a n.10, 194a n.15, 221a-223a. In the district court's view, neither the terrorist attacks of 9/11, nor respondents' desire to hold Hasty and Sherman liable for following FBI terrorism designations, rendered this context different from those cases. *Id.* at 184a-185a n.10, 194a n.15.

2. The district court also ruled that the Complaint satisfies *Ashcroft* v. *Iqbal*, 556 U.S. 662. Under *Iqbal*, "well-pleaded factual allegations" must "plausibly give rise to an entitlement to relief." *Id.* at 679. The court applied *Iqbal* to the "official conditions" and "unofficial conditions" separately. Regarding the Fifth Amendment challenge to official confinement conditions (Counts 1 and 6),[3] the court held that Hasty's and Sherman's "punitive intent" plausibly could be inferred from the conditions themselves. Pet. App. 192a. As to unofficial conditions,

[3] The court addressed the Fifth Amendment component of Count 6, which challenged strip searches, alongside the official-conditions claims in Count 1. Pet. App. 221a n.30.

the court identified no indication that Hasty or Sherman had mistreated any prisoner. But it found respondents' allegations of deliberate indifference sufficient. *Ibid.*

The district court also sustained the equal-protection claim (Count 2). The Complaint, it held, plausibly alleged Hasty and Sherman had imposed restrictive conditions because of respondents' race, religion, and/or national origin. The court invoked allegations that Hasty and Sherman learned that "the FBI had not developed any information to tie [respondents] to terrorism." Pet. App. 201a. From that, it held, one could infer petitioners imposed restrictive conditions based on race or religion (as opposed to the obligation to follow FBI designations and BOP policy). The district court also upheld respondents' Fourth Amendment challenge to strip searches (Count 6), finding the Complaint sufficiently alleged that those searches lacked "legitimate penological purpose." *Id.* at 222a. Finally, the court held that respondents adequately pleaded a conspiracy claim under §1985(3) because Hasty and Sherman had agreed to "implement[] the facially discriminatory harsh confinement policy." *Id.* at 224a.

3. The district court denied qualified immunity. Addressing the due-process conditions-of-confinement claims (Counts 1 and 6), the court found it clearly established in 2001 that pretrial detainees could not be subject to "punitive conditions of confinement." Pet. App. 193a. It reached the same conclusion on the equal-protection claim (Count 2): "[E]xpressly singling out Arabs and Muslims for harsh conditions of confinement," the court held, violated clearly established law. *Id.* at 201a. As for the Fourth Amendment strip-search claim (Count 6), the court ruled that "[i]t was clearly established * * * that a strip search policy designed to punish and humiliate was

not reasonably related to a legitimate penological purpose." *Id.* at 223a.

The district court denied qualified immunity on the § 1985(3) conspiracy claim. The court acknowledged that "it may not have been clearly established in 2001" that § 1985 reached conspiracies by federal officers. Pet. App. 225a. But it denied qualified immunity because no federal official could have reasonably believed it "'legally permissible'" to conspire, regardless of the legal "'source'" of respondents' right. *Ibid.* (emphasis omitted).

4. The district court dismissed the claims against the DOJ Defendants, holding that the Complaint did not meet *Iqbal*'s requirements. Pet. App. 158a-159a.

II. Proceedings In The Second Circuit

A. The Panel Decision

A divided panel of the Second Circuit affirmed as relevant to Hasty and Sherman and reversed as to the DOJ Defendants, reinstating the claims against them. Judge Raggi issued a 91-page dissent.

1. The panel majority first addressed whether the judicially created *Bivens* action extends to this context. Pet. App. 21a-29a. The majority did not dispute that, for more than three decades, this Court has refused to extend *Bivens* to any new contexts or categories of defendants. The majority likewise agreed that "context" encompasses more than the identity of the constitutional right allegedly violated. For example, while this Court had extended *Bivens* to certain employment-related equal-protection claims, *Davis* v. *Passman*, 442 U.S. 228, 230-231, 248-249 (1979), it refused to extend *Bivens* to such claims in the military context, *Chappell* v. *Wallace*, 462 U.S. 296, 298, 305 (1983). See Pet. App. 23a-24a & n.15. But the majority ruled that the context here—a

national-security response to an unprecedented terrorist attack—was not "new," and it required no inquiry into whether special factors preclude *Bivens*' extension.

When deciding whether a context is "new," the majority declared, courts should look to (a) the "rights injured" and (b) the "mechanism of injury." Pet. App. 24a. The "rights injured" here, it stated, were "substantive due process and equal protection," and the "mechanism of injury" was "punitive conditions without sufficient cause." *Ibid.* The majority thus equated this case with garden-variety conditions-of-confinement challenges by commonplace prisoners in ordinary circumstances. The context, it declared, was: "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Ibid.*

In defining the "context," the majority declined to consider any national-security, foreign-relations, or other issues related to the detention of aliens following a terrorist attack. It did not ask "who should decide whether [to provide] such a remedy" in this context, Congress, or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). And it did not consider whether special factors counsel hesitation before offering a court-created *Bivens* remedy for claims that local jailers should have ignored FBI terrorism designations based on their own putative conclusions. Instead, it held that, because ordinary prisoners previously had been permitted to bring conditions-of-confinement claims in ordinary contexts, respondents here could as well. Pet. App. 23a-24a n.15.

2. The majority then turned to the Complaint's adequacy under *Iqbal* and to qualified immunity.

Counts 1 and 6 (Confinement Conditions). The majority did not deny that the official conditions imposed

here—the "'most restrictive and secure conditions permitted,'" Pet. App. 49a—were lawful under certain circumstances. Nor did it dispute that BOP policy obligated Hasty and Sherman to impose those conditions on detainees designated "of interest" (or higher) to the 9/11 investigation, including respondents. And the majority admitted that Hasty's and Sherman's "responsibility to carry out" that directive from BOP superiors "would not sustain liability." *Ibid.*

The majority held, however, that the Complaint adequately pleaded due-process claims because Hasty and Sherman allegedly knew the "FBI lacked any individualized suspicion for many" detainees but imposed restrictive conditions anyway. Pet. App. 50a-51a. The majority stated that Hasty and Sherman received "regular written updates" describing why each detainee was arrested and "'all evidence relevant to the danger he might pose'" to the prison. *Id.* at 50a. Because those updates did not link respondents to terrorism, the majority reasoned, the Complaint plausibly alleged that Hasty and Sherman "knew" the FBI's "of interest" designations were unfounded and, as a result, should have been disregarded. *Id.* at 50a-52a.

The majority also relied on Hasty's and Sherman's alleged approval of a putatively "false" document stating that respondents had been classified as "suspected terrorists" and designated as "High Security" based on "individualized assessment[s]." Pet. App. 51a. The Complaint alleged that Hasty and Sherman approved that document knowing no individualized assessments had occurred. *Id.* at 51a-52a.

Turning to the unofficial conditions (unauthorized abuse by guards), the majority determined that the Complaint satisfied *Iqbal* with respect to Hasty. Pet. App.

54a-55a. The majority relied on allegations that "Hasty avoided evidence of detainee abuse" by "'neglecting to make rounds on the ADMAX [SHU].'" *Id.* at 54a. It invoked general allegations that Hasty became aware of abuse and "encouraged" harsh treatment by "referring to" the detainees "as terrorists." *Id.* at 55a.[4]

The majority denied qualified immunity. At the time Hasty and Sherman acted, the majority stated, it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates the "constitutional rights of detainees." Pet. App. 55a-56a. It did not address the specific circumstances Hasty and Sherman confronted—whether it was clearly established that Hasty and Sherman were constitutionally required to disregard the FBI's designations if they subjectively believed them erroneous.

Count 2 (Equal Protection). The majority invoked similar reasoning to hold that Count 2 stated a plausible equal-protection claim, relying almost exclusively on the allegedly "untruthful" document supposedly approved by Hasty and Sherman. Given the allegations of "duplicity regarding the basis for confining the 9/11 detainees," the majority concluded, "it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining * * * Arabs and Muslims in harsh conditions * * * based on discriminatory intent." Pet. App. 67a. The majority denied qualified immunity, reasoning that "it was clearly established * * * that it was illegal to * * * target [respondents] for mistreatment because of their

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[4] The unofficial-conditions claims against Sherman were dismissed. Pet. App. 55a.

race, ethnicity, religion, and/or national origin." *Id.* at 71a.[5]

Count 7 (§ 1985(3)). Finally, the court addressed the allegations that Hasty and Sherman violated § 1985(3) by conspiring to violate respondents' equal-protection rights. The majority acknowledged that, under the intra-enterprise conspiracy doctrine, members of a single entity—like the Department of Justice, which includes the BOP—cannot conspire for purposes of § 1985(3). But it refused to "decid[e] as a matter of law that" BOP and DOJ comprised one entity, remanding that issue to the district court. Pet. App. 79a-80a.

The majority denied qualified immunity as well. It did not dispute that, in 2001, it was *not clear* that § 1985(3) extended to federal officers. Nor did it dispute uncertainty over whether § 1985(3) covered the alleged conspiracy here given the intra-enterprise conspiracy doctrine. Pet. App. 80a & n.46. The majority nevertheless denied immunity because federal officials could not reasonably believe it permissible to conspire with other federal officials to violate equal-protection rights. *Id.* at 80a-81a.

3. On respondents' cross-appeal, the majority reversed dismissal of the DOJ Defendants. It held that the Complaint met *Iqbal*'s plausibility requirement and denied qualified immunity. Pet. App. 30a-47a, 59a-65a, 71a-72a.

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[5] The majority also found the Complaint's Fourth Amendment strip-search allegations adequate and denied qualified immunity. Pet. App. 72a-77a.

B. Judge Raggi's Dissent

Judge Raggi dissented. In her 91-page dissent, she urged that this case presented a "new context" replete with special factors making *Bivens*' extension inappropriate. Pet. App. 87a-113a. She concluded that the allegations were insufficient under *Iqbal*, and that defendants were entitled to qualified immunity. *Id.* at 113a-156a.

C. The Six-Judge Dissent from Denial of Rehearing En Banc

The Second Circuit denied rehearing en banc by an evenly divided vote. Agreeing with Judge Raggi's dissent, the six dissenting judges observed that this case "raises questions of exceptional importance meriting further review." Pet. App. 232a.

The panel decision, they explained, placed the Second Circuit "at odds" with four "sister circuits" and made the Second Circuit the first court of appeals to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a, 233a. The dissenters deemed it obvious that the context was "new" and involved sensitive matters—like immigration and national security—that rendered *Bivens*' expansion inappropriate. *Id.* at 233a-236a. The panel had reached the opposite conclusion only by "redefining the few established *Bivens* contexts at an impermissibly 'high level of generality.'" *Id.* at 233a-234a. In doing so, the panel "avoid[ed] its obligation" to consider special factors when deciding whether authorization of a damages action "in th[ese] unprecedented legal and factual circumstances" should come from Congress or the courts. *Ibid.*

The dissenters also urged that the panel's qualified-immunity analysis warranted further review. They ob-

served that, under *Mullenix* v. *Luna*, 136 S. Ct. 305 (2015), qualified immunity must be granted unless the rights asserted "were so clearly established with respect to the '*particular* conduct' and the '*specific* context' at issue that every reasonable official would have understood that his conduct was unlawful." Pet. App. 237a (emphasis added). The panel had cited no case providing that clarity. *Ibid.*

The panel decision, moreover, diluted *Iqbal*'s requirement that plaintiffs "plead a plausible claim grounded in a factual basis"—not facts "'merely consistent with a defendant's liability.'" Pet. App. 238a. The panel sustained the Complaint, the dissenters urged, based on "hypothesized possibilities" and "conclusory assumptions or insinuations." *Ibid.* The "need to ensure faithful adherence to the *Iqbal* pleading standard" thus supported further review. *Id.* at 238a-239a.

REASONS FOR GRANTING THE PETITION

As six judges of the Second Circuit have urged, this case presents "questions of exceptional importance." Pet. App. 232a. The decision below puts the Second Circuit "at odds" with four other circuits and "controlling * * * precedent" of this Court. *Id.* at 233a. It does not merely hold that *Bivens* extends to a context rife with special factors, including national security, risk to intelligence materials, and foreign-affairs concerns. It also announces a new test for determining *Bivens*' scope that renders that judicially created cause of action almost infinitely elastic. It adopts a qualified-immunity standard this Court rejected decades ago. And it renders *Iqbal*'s "plausibility" requirement virtually meaningless.

Petitioners Hasty and Sherman were jailers at a federal facility where respondents—foreign nationals illegally in the United States—were detained following the 9/11

terrorist attacks. The crux of respondents' claims is that Hasty and Sherman were constitutionally compelled to *disregard* the FBI's terrorism designations, and to remove respondents from the restrictive confinement conditions required by those designations, because Hasty and Sherman supposedly believed the FBI's designations were wrong.

The panel concluded that *Bivens* extends to that exceptional context—and exposes individual officers to personal liability for damages—without considering the myriad special factors that would ordinarily preclude *Bivens*' expansion. It reasoned that a *Bivens* action exists here because courts had allowed *Bivens* actions by ordinary prisoners, in ordinary circumstances, in ordinary times, to pursue ordinary challenges to confinement conditions. The panel denied qualified immunity, finding it "clearly established" in 2001 that the Constitution required jailers to reject FBI terrorism determinations based on their own conjecture. Finally, the panel's analysis of the claims here, including the allegation that local jailers "knew" the FBI was wrong and should have disregarded its determinations—cannot be reconciled with the plausibility requirement of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

I. The Case Presents Important Questions—And Circuit Conflicts—Regarding *Bivens*' Scope

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). For the last 35 years, however, the Court has refused to "extend *Bivens* liability to any new context or new category of defendants." *Id.* at 68. It has declined to

extend *Bivens* to "claims of First Amendment violations by federal employers, *Bush* v. *Lucas*, 462 U.S. 367 (1983), harm to military personnel through activity incident to service, *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and wrongful denials of Social Security disability benefits, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). It has also "seen no case for extending *Bivens* to claims against federal agencies, *FDIC* v. *Meyer*, 510 U.S. 471 (1994), or against private prisons, [*Malesko*, 534 U.S. 61]." *Wilkie*, 551 U.S. at 550.

In the decision below, the Second Circuit held that *Bivens* extends to a new context for which it is singularly ill-suited—"actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a. Worse, it extended *Bivens* to claims that *local jailers* should have *disregarded* the *FBI*'s terrorism designations. The test the panel adopted invites a vast expansion of *Bivens* without inquiry into the "special factors" that would ordinarily preclude *Bivens*' extension. And the decision creates multiple, acknowledged circuit conflicts in the process. Review is warranted.

A. The Second Circuit's Decision Defies This Court's Special-Factors Framework

"Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 556 U.S. at 675. Courts must "'pay[ ] particular heed'" not to expand *Bivens* to a new context where "'special factors counsel[ ] hesitation.'" *Wilkie*, 551 U.S. at 550.

1. "Special factors" includes an array of considerations that weigh against judicial expansion of *Bivens* in the absence of affirmative direction from Congress. They include matters touching on "military, national se-

curity, or intelligence," *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012); cases involving sensitive or classified information, see *Lebron* v. *Rumsfeld*, 670 F.3d 540, 553-554 (4th Cir. 2012); challenges to official "policy," *Malesko*, 534 U.S. at 74; and indications that Congress was aware of the issue but declined to create a statutory damages action, see *Vance* v. *Rumsfeld*, 701 F.3d 193, 201 (7th Cir. 2012) (en banc).

The special-factors inquiry turns not on "the merits of the particular remedy," but on "*who should decide* whether [to provide] such a remedy"—Congress, or the courts. *Bush*, 462 U.S. at 380 (emphasis added). Where "special factors" are present, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation," and courts should not themselves imply a new damages remedy against federal officers. *Id.* at 389.

2. The Second Circuit bypassed the "special factors" analysis here on the theory that it was not extending *Bivens* at all. It did so by adopting an overly generalized—and thus fundamentally flawed—test for determining whether a context is "new." Pet. App. 24a-29a. A context is not "new," the court held, if the "rights injured" and the "mechanism of injury" match those in prior *Bivens* actions. *Id.* at 24a. In this case, the panel identified the injured rights as "substantive due process," "equal protection," and "Fourth Amendment" rights, concluding that *Bivens* actions had been recognized for violations of those rights before. *Id.* at 24a, 28a. It then identified the "mechanism of injury"—"punitive conditions without sufficient cause" and "an unreasonable search performed by a prison official"—and concluded that they were not new. *Ibid.* The court thus defined the "context" here as "federal detainee[s] * * * alleg[ing] that

individual federal officers subjected them to punitive conditions" or "subjected them to unreasonable searches." *Ibid.*[6] At that high level of abstraction, there was no difference between the extraordinary context here—jailers deferring to FBI terrorism designations in the wake of 9/11—and run-of-the-mill prisoner suits alleging "punitive conditions" or "unreasonable searches." *Ibid.*

That now-governing "rights injured"/"mechanism of injury" framework completely decontextualizes "context." Whether *Bivens* should be available is a question of whether Congress or the courts should create the cause of action. As Judge Raggi stated in dissent, "[s]uch a judgment necessarily requires more than the *general* identification of a constitutional right or a mechanism of injury." Pet. App. 90a-91a (emphasis added). "It demands consideration of *all factors* counseling for and against an implied damages action in the *specific legal and factual circumstances presented.*" *Id.* at 91a. (emphasis added). "[W]here a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in that context." *Ibid.* (quoting *Wilkie*, 551 U.S. at 550).

This case illustrates precisely the error in the panel majority's approach. This case resonates with special factors that compel the conclusion that *Congress*, not the courts, must decide whether to recognize a damages ac-

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[6] Even then, the Second Circuit had to "mix and match a 'right' from one *Bivens* case with a 'mechanism of injury' from another" to conclude that *Bivens* had previously been extended to this context. Pet. App. 92a.

tion against individual officers here. The case concerns the security response to the 9/11 terrorist attacks. It involves FBI terrorism designations for detained foreign nationals, unlawfully present in the United States, following those attacks. And it seeks to hold local jailers liable for not disregarding the FBI's terrorism designations, and the BOP's corresponding mandatory confinement conditions, based on their own alleged conclusions about each detainee's terrorism connections. If this Court's admonition against extending *Bivens* to new "contexts" means anything, a suit arising in such unprecedented circumstances cannot be the same context as an ordinary suit by an ordinary prisoner over ordinary confinement conditions in ordinary times.

The panel's two-step approach thus "invite[s]" *Bivens*' expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561. "At a sufficiently high level of generality," it is not hard for very different cases to be "analogized to some other claim for which a *Bivens* action is afforded." *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010). Under the panel's approach, different contexts would rarely qualify as "new," resulting in potential personal liability for government officials regardless of how powerfully special factors weigh against *Bivens*' expansion.

3. The panel's approach also defies this Court's precedents. In *Davis* v. *Passman*, 442 U.S. 228, 230-231, 248-249 (1979), this Court implied a *Bivens* remedy in favor of a former congressional staffer claiming gender discrimination in violation of the Fifth Amendment. Four years later, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the Court considered whether *Bivens* could be asserted by U.S. Navy sailors likewise claiming employment discrimination. Under the Second Circuit's "source of

right"/"mechanism of injury" formulation, *Chappell* would not have been a new "context," and *Bivens* would have been available. In both *Chappell* and *Passman*, the source of the right (Fifth Amendment) and the mechanism of injury (discriminatory employment actions) were the same; the "context" of both would have been "claims by government employees that their equal-protection rights were violated by employment discrimination."

But this Court recognized that *Chappell* was a new context; that it implicated different concerns; and that special factors precluded *Bivens*' expansion. The Court considered the "special status" of the *Chappell* plaintiffs' military service, and—most critically—the fact that the claims implicated "the framework of the military establishment." 462 U.S. at 301-303. The Court found a judicial remedy particularly inappropriate given Congress's long-standing "'authority over national defense and military affairs.'" *Id.* at 301. The Second Circuit's framework thus defies common sense and precedent alike.[7]

B. The Decision Below Creates Multiple Circuit Conflicts

The decision below also creates openly acknowledged circuit conflicts over how courts should determine *Bivens*' scope. Pet. App. 233a.

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[7] The Second Circuit characterized *Chappell* as "focus[ing] on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." Pet. App. 24a n.15. But the Second Circuit ignored the special nature of any "mechanism of injury" here, disregarding national-security concerns and the very different relationship the FBI and local jailers have in identifying terrorist threats. See *id.* at 30a-31a.

1. *The Circuits Are in Conflict Regarding When a* Bivens *Claim Implicates a "New Context" Requiring Special-Factors Analysis*

The Second Circuit's "source of right"/"mechanism of injury" approach places it in conflict with the Fifth, Ninth, and D.C. Circuits. The courts generally agree that the relevant "context" for *Bivens* purposes must be defined in terms of "a potentially recurring scenario that has similar *legal* and *factual* components." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (emphasis added, quotation marks omitted); *De La Paz* v. *Coy*, 786 F.3d 367, 372 (5th Cir. 2015); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2011); *Arar*, 585 F.3d at 572.

The Fifth, Ninth, and D.C. Circuits apply that standard directly. In *Meshal*, the D.C. Circuit held that *Bivens* could not be extended to the Fourth Amendment claims of an American detained abroad, without a hearing, on suspicion of terrorism. 804 F.3d at 418-420. Declining to look solely at the rights violated (Fourth Amendment) and the mechanism of injury (detention without a hearing), the D.C. Circuit found the context "new" because "the agents' actions took place during a terrorism investigation *and* those actions occurred overseas." *Id.* at 418. The court analyzed "special factors" and determined that they "counsel[ed] hesitation." *Ibid.*

That conflicts with the Second Circuit's decision here. Here, the court allowed a *Bivens* action *despite* the context of a terrorism investigation. By contrast, in *Meshal*, the D.C. Circuit refused a *Bivens* remedy *because* the case implicated a terrorism investigation. As the dissenter in *Meshal* emphasized, the "law enforcement investigations in *Turkmen* were at least as related to the investigation of suspected terrorism as the investigation at

issue" in *Meshal*, "but the Second Circuit found no bar to *Bivens* claims." 804 F.3d at 443 (Pillard, J., dissenting) (citation omitted).

The decision below likewise conflicts with decisions of the Fifth and Ninth Circuits. Both *Coy* and *Mirmehdi* declined to permit Fourth Amendment *Bivens* claims for allegedly unlawful immigration arrests and detention. Although *Bivens* itself was a Fourth Amendment challenge to an unlawful detention, *Bivens*, 403 U.S. at 389-390, *Coy* and *Mirmehdi* held that *immigration* detentions were a new context. As the Ninth Circuit explained, "[d]eportation proceedings are * * * a context[ ] unique from other situations where an unlawful detention may arise." *Mirmehdi*, 689 F.3d at 981. The Fifth Circuit agreed that "deportation proceedings" and actions "under the immigration law constitute new contexts under *Bivens*." *Coy*, 786 F.3d at 375, 377-379.

Under the Second Circuit's approach, however, that context could not have been considered new because the right (Fourth Amendment) and the mechanism of injury (unlawful detention) were the same as in *Bivens* itself. For precisely that reason, Judge Prado (joined by Judges Dennis and Graves) dissented from denial of rehearing en banc in *Coy*, urging that the panel there "reaches the opposite conclusion" from this case and "puts [the Fifth Circuit] in conflict with" the Second. *De La Paz* v. *Coy*, 804 F.3d 1200, 1202 (5th Cir. 2015) (Prado, J., dissenting).

2. *Four Circuits Have Refused To Extend* Bivens *to This Context*

As the six dissenters from denial of rehearing en banc explained, the decision in this case also creates a conflict with four circuits—the Fourth, Seventh, Ninth, and D.C.—that have held that *Bivens* provides no damages

remedy "against executive branch officials for national security actions taken after the 9/11 attacks." Pet. App. 233a. In the decision below, the Second Circuit became "the first [court] in the nation to imply a *Bivens* damages action" in that context. *Id.* at 231a (footnote omitted).

In *Lebron*, the Fourth Circuit refused to extend *Bivens* to claims against Department of Defense officials arising from the seizure of a citizen at O'Hare airport and his detention as an enemy combatant. Special factors counseled hesitation because a *Bivens* remedy would "'intrude upon the authority of the Executive in military and national security affairs.'" 670 F.3d at 549. Whether "the judiciary" should "review and disapprove sensitive military decisions made after extensive deliberations within the executive branch," the court held, is a decision more "'appropriate[ ] for those who write the laws, rather than for those who interpret them.'" *Id.* at 551-552.

The Seventh Circuit and the D.C. Circuit invoked similar concerns when holding that contractors had no *Bivens* action for claims stemming from detentions and interrogations in Iraq. Noting that the "Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence," the D.C. Circuit explained in *Doe* that expanding *Bivens* "would require a court to delve into the military's policies regarding the designation of detainees as 'security internees' or 'enemy combatants,' as well as policies governing interrogation techniques." 683 F.3d at 394, 396. And in *Vance*, the en banc Seventh Circuit held that special factors precluded expanding *Bivens* because, in the national-security context, judges "may lack vital knowledge" that "executive officials possess." 701 F.3d at 200.

Finally, in *Mirmehdi*, the Ninth Circuit refused to allow a *Bivens* action challenging the INS's decision to revoke the plaintiffs' bond based on allegations that they had terrorist ties. Special factors counseled hesitation because "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation'" and "often involve 'the disclosure of foreign-policy objectives and * * * foreign-intelligence products.'" 689 F.3d at 982-983.

Neither the analyses nor the results in those cases can be reconciled with the decision below. Four circuits recognize that special factors counsel hesitation when a plaintiff seeks to extend *Bivens* to claims touching on national security, foreign affairs, intelligence, and immigration. Those courts concluded that Congress is in a "better position" than the courts "to decide whether or not the public interest would be served by creating" damages liability. *Bush*, 462 U.S. at 390. Here, the Second Circuit reached the opposite result.

C. This Case Demonstrates Why "Special Factors" Analysis Is Critical

This case demonstrates precisely the risks created by the Second Circuit's approach. It is replete with special factors indicating that Congress, not the courts, should decide whether a damages remedy is appropriate.

This case involves national-security actions following the most devastating terrorist attack in American history. "[T]he executive's exercise of national security authority * * * will be *the* critical focus" of this case. Pet. App. 104a. Indeed, the propriety of the FBI's terrorism designations, and the claim that Hasty and Sherman should not have accorded them respect, is central to respondents' claims. See p. 4, *supra*. Respondents, moreover, challenge what *they* characterize as a security "poli-

cy" promulgated by senior Executive Branch officials. Pet. App. 234a. But as this Court has long recognized, "[m]atters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see also *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 24, 26 (2008). And "the *Bivens* remedy * * * ha[s] never [been] considered a proper vehicle for altering" government policy. *Malesko*, 534 U.S. at 74. Yet the panel majority refused to address any of those factors or the propriety of affording a *Bivens* action here in light of them.

Cases involving terrorism and national security, moreover, often involve classified or sensitive information that typical prison-conditions cases do not. The disclosure of sensitive or classified information could have disastrous consequences. *Lebron*, 670 F.3d at 554. Because "even inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collecting intelligence," the potential involvement of such information weighs dispositively against *Bivens*' expansion. *Ibid.* As this Court has observed, "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. 159, 175 (1985).

It is no answer that the courts can enter protective orders or make case-by-case determinations. If the *context* could implicate sensitive information, whether to create a cause of action—as well as its scope and any means for protecting such information—should be left to Congress. Indeed, the magnitude of risk to sensitive information "often elude[s] judicial assessment." *Lebron*, 670 F.3d at 554. "Unlike the President and some designated Members of Congress, * * * most federal judges [do not] begin

the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008). The potential consequences of inadvertent disclosure are "'too obvious to call for enlarged discussion.'" *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988).

This case also bristles with foreign-relations concerns. Because "the 9/11 hijackers were all foreign nationals," the government's response "carrie[s] a major immigration law component." Pet. App. 8a. Because of its "'natural tendency to affect diplomacy, foreign policy, and the security of the nation,'" immigration is a field where the judiciary typically stays its hand in deference to the political branches. *Mirmehdi*, 689 F.3d at 982-983.

To the Second Circuit, those considerations were irrelevant. Under its framework, this case arises in the same "context" as any garden-variety case involving "federal detainee[s]" and allegations of "punitive conditions" or "unreasonable searches." Pet. App. 24a, 28a. That utterly acontextual approach to "context" defies the purpose of the special-factors inquiry. If courts are to hear damages actions in this arena, "it should be because the legislative branch has authorized that course." *Lebron*, 670 F.3d at 554. That is so "not only because constitutional authority to" create causes of action rests with the political branches, "but also because that's where the expertise lies." *Vance*, 701 F.3d at 200; see *id.* at 202-203; *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008). Congress has been informed of "the concerns raised in this [particular] lawsuit," yet has provided no damages remedy. Pet. App. 235a; see *Lebron*, 670 F.3d at 551-552; *Vance*, 701 F.3d at 201. The judiciary should not reach out to supply that remedy in Congress's stead.

II. The Second Circuit's Decision Defies This Court's Qualified Immunity Precedents

In denying Hasty and Sherman qualified immunity, the Second Circuit essentially repeated the errors it made in extending *Bivens*—assessing claims at a high level of generality without regard for the particular context. In doing so, the panel again departed from this Court's precedents.

A. The Decision Below Defies Settled Qualified Immunity Principles

To overcome qualified immunity, a plaintiff must show that the defendant's actions violated "clearly established" rights. *Wood* v. *Moss*, 134 S. Ct. 2056, 2061 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [the] right [were] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Courts thus may "not * * * define clearly established law at a high level of generality." *Id.* at 2084.

For example, qualified immunity may not be denied in a Fourth Amendment case simply because the right to be free from unreasonable searches is clearly established by the Fourth Amendment itself. *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). Instead, qualified immunity may be denied only if "a reasonable official would understand that *what he is doing*"—in the circumstances he confronted—"violates that right." *Id.* at 640 (emphasis added). The rights thus must be clearly established with respect to the "'particular conduct'" in the "'specific context'" at issue. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015).

1. In this case, respondents seek to hold Hasty and Sherman liable for obeying FBI terrorism designations, and a BOP policy that required all individuals "of interest" to the terrorism investigation to be detained in the most restrictive conditions permissible. See Pet. App. 17a. The court of appeals did not dispute that adherence to BOP policy was not itself actionable. *Id.* at 49a. But it held that Hasty and Sherman could be liable because, according to the Complaint, they "'were aware that the FBI had not developed any information'" tying respondents "'to terrorism'" but failed to unilaterally *overrule the FBI's terrorism designations* and place respondents in less restrictive conditions. *Ibid.* But no law, much less "clearly established" law, required that. Only a decidedly *unreasonable* jailer would disregard the FBI's terrorism designations, disregard the BOP's policy, and act upon his own terrorism assessment instead.[8]

The Second Circuit denied qualified immunity because it was clearly established "that a particular condition or restriction of pretrial detention not reasonably related to a legitimate government objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that defies this Court's direction to consider the "'particular conduct'" and "'specific context'" at issue. *Mullenix*, 136 S. Ct. at 308. Courts cannot ask if the general legal standard was clear. *Anderson*, 483 U.S. at 640. They must ask whether every "'reasonable official'" facing *those circumstances* would have understood his

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[8] Courts routinely grant qualified immunity to officials who rely on information received from or determinations made by fellow officers or agencies. See, *e.g.*, *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012); *United States* v. *Hensley*, 469 U.S. 221, 232-233 (1985); *Elkins* v. *District of Columbia*, 690 F.3d 554, 568 (D.C. Cir. 2012).

conduct to be unlawful. *Ibid.* Consequently, qualified immunity can be denied here only if "clearly established" constitutional principles required Hasty and Sherman to *disregard* the FBI's terrorism designations in favor of their own, subjective conclusions. No such law exists.

2. The panel's approach is especially pernicious because it makes immunity turn on allegations regarding Hasty's and Sherman's subjective beliefs. See Pet. App. 50a. Qualified immunity depends "on the objective reasonableness of an official's conduct." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). What matters is whether any reasonable officer could have thought it permissible to adhere to the FBI's designations given *the facts* before the officers—not what *these officers* supposedly *believed* based on those facts.

For precisely those reasons, *Brady* v. *Dill*, 187 F.3d 104 (1st Cir. 1999), rejected the argument that officers could be held liable for arresting the plaintiff under a valid warrant because they "knew" the plaintiff was innocent. The plaintiff alleged that the officers "came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying charge." *Id.* at 113. The First Circuit granted qualified immunity because the officers' "failure to release [the plaintiff] unilaterally once they began to believe that he was innocent" violated no clearly established right. *Id.* at 116. Such "subjective belief," *Brady* explained, "is generally insufficient to justify a police officer's unilateral release of a person who has been lawfully arrested pursuant to a valid judicial order." *Id.* at 113. Indeed, if subjective beliefs controlled, plaintiffs could overcome immunity simply by alleging that the officers "knew" the arrestee was innocent, the

warrant was invalid, etc. The Second Circuit's decision invites precisely that sort of evasion.

B. The Second Circuit's Ruling on § 1985(3) Flouts This Court's Precedents

The Second Circuit's denial of qualified immunity for the § 1985(3) conspiracy claim underscores the need for review. Twice, this Court has held that, when evaluating qualified immunity, "the clearly established right [must] be *the federal right on which the claim for relief is based.*" *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (emphasis added). "[O]fficials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984). Thus, in *Davis*, it made no difference that the conduct clearly violated a regulation. Defendants were entitled to immunity on the due-process and § 1983 claims being asserted because *those* provisions did not clearly prohibit the conduct. *Id.* at 194-195 & n.12.

The Second Circuit follows the opposite rule. Whether the claim is under the Fifth Amendment, a federal statute, or some other source, that court held, "is of no consequence to the question of whether the right was clearly established, because the proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007); see *Iqbal* v. *Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (similar). That defies *Elder* and *Davis*. And it was determinative here. The panel conceded that, when Hasty and Sherman acted, it was *not* clearly established that their conduct would violate *§ 1985(3)*'s prohibition on certain conspiracies. It was unclear that § 1985(3) applied to federal officers. See *Hasty*, 490 F.3d at 176. It was also unclear whether, under the intra-enterprise con-

spiracy doctrine, an agreement among officers within a single unit of government—here, the Department of Justice (which includes BOP)—constitutes a conspiracy that violates § 1985(3). Pet. App. 79a-80a.[9] But the panel denied immunity because "'federal officials could not reasonably have believed that it was legally permissible for them to conspire * * * to deprive a person of equal protection of the laws'" regardless of whether the conspiracy would clearly violate *§ 1985*. *Id.* at 81a. That departure from *Elder* and *Davis* warrants review.

III. THE DECISION BELOW EVISCERATES *IQBAL*'S PLAUSIBILITY REQUIREMENT

The court of appeals' decision likewise cannot be reconciled with *Iqbal*'s requirement that a complaint's factual allegations give the claim "facial plausibility." 556 U.S. at 678. Facial plausibility requires more than conjecture. It requires factual allegations that eliminate "'obvious alternative explanation[s]'" for the allegedly unconstitutional conduct. *Id.* at 682.

Here, the court of appeals did not dispute that respondents were lawfully detained. See Pet. App. 237a. Nor did it deny that BOP policy required *all* detainees designated "of interest" (or higher) to be held under restrictive conditions. *Id.* at 17a. And it agreed that respondents had been so designated by the FBI, mandating the conditions Hasty and Sherman allegedly imposed. *Id.* at 18a-19a.

The court of appeals held that respondents nonetheless stated plausible due-process and equal-protection

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[9] It is difficult to imagine, however, that any federal official would understand that acting within the chain of command, pursuant to official policies, could constitute "conspiracy."

claims because the Complaint alleges that Hasty and Sherman knew the "FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 50a. That supposed knowledge was based on their receipt of "regular written updates" explaining why each detainee was arrested, as well as "'evidence relevant to the danger'" each detainee "'might pose' to the MDC." *Ibid.* Because those "updates" did not tie respondents to terrorist activities, the court held, it was plausible Hasty and Sherman "knew" the FBI's designations were wrong and imposed the restrictive conditions punitively. *Ibid.*

That is not "plausibility" under *Iqbal*. Quite the opposite. It ignores the "'obvious'" and "more likely" explanation for respondents' restrictive confinement—that Hasty and Sherman deferred to the terrorism designations made by the FBI, an agency with far more national-security experience and likely more information than it shared with Hasty and Sherman. Indeed, the Complaint offers no reason why anyone would have believed the FBI was sending, into a prison, "written updates" with *all* potentially sensitive and confidential information about terrorism detainees. The Complaint itself alleges that the updates contained only "'evidence relevant to the danger [the detainees] might pose' *to the MDC*'," Pet. App. 50a (emphasis added)—not necessarily all information intelligence agencies had gathered connecting detainees to terrorism.

The panel's departure from the "plausibility" requirement is underscored by its effort to divine discriminatory intent from a vague allegation that Hasty and Sherman "approved" an unspecified "document," of unstated date and purpose, that was supposedly "false"—"mendac[ious]" in the panel's view—allegedly stating "that the

executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment." Pet. App. 66a-67a. As Judge Raggi pointed out, however, the "obvious[ ] and more likely" explanation of the document is that MDC officials were properly "re-l[ying] on the FBI's designations." *Id.* at 151a.[10] Here, too, the panel disregarded *Iqbal*'s requirement that the Complaint dispel "'obvious alternative explanation[s].'" 556 U.S. at 682.

The panel's unofficial conditions analysis waters down *Iqbal* further still. A federal official is not personally liable for the actions of subordinates absent personal involvement in those actions. *Iqbal*, 556 U.S. at 676-677. Yet the Complaint does not allege that Hasty engaged in any abuse, had advance notice of, observed, or ratified any abuse. It alleges Hasty referred to detainees as "terrorists," learned that the BOP was investigating allegations of abuse, and was "made aware" of the abuse. Pet. App. 54a-55a. But those allegations lack the *factual* content needed to plausibly support a claim of personal involvement. And they ignore reality. As Warden, Hasty was responsible for the entire one-million-square-foot MDC facility. And he delegated "direct responsibility for custody operations" of the ADMAX SHU to a BOP Captain on his staff. *Id.* at 401a n.95. To infer personal in-

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[10] The document itself makes that clear. Dated three days after the attacks, before any respondent was housed at MDC, the document does *not* state that *MDC staff* "had classified the 'suspected terrorists' as 'High Security.'" Pet. App. 272a; *id.* at 467a. It says MDC staff "determined" that the detainees "*have been* classified" —presumably by the FBI—"as 'High Security' inmates." *Id.* at 467a (emphasis added). The document, moreover, admonishes MDC staff to show "[p]rofessionalism" and prohibits "humiliat[ing] and provok[ing]" the detainees. *Id.* at 469a. Evidence of mendacity it is not.

volvement in abuse, let alone punitive intent, because Hasty allegedly "'neglect[ed] to make rounds on the ADMAX [SHU] unit,'" *id.* at 54a, ignores that "obvious" and "more likely" explanation.

IV. The Issues Are Important And Recurring

As six Second Circuit judges who dissented from denial of rehearing en banc explained, this case "raises questions of exceptional importance meriting further review." Pet. App. 232a. The panel's expansion of *Bivens*, diminution of qualified immunity, and evisceration of *Iqbal*'s pleading standard invite unwarranted judicial intrusion into Executive Branch functioning on critical matters of national security.

If ever a damages action merited *Congress's* consideration before its creation, it is one arising in the national-security arena—an area that is "rarely [a] proper subject[ ] for judicial intervention." *Haig*, 453 U.S. at 292. By ignoring the national-security context, the foreign-affairs impact, and the potential effects on confidential information, the Second Circuit's decision extending *Bivens* threatens frequent interference in the national-security realm. And the panel's new test for deciding *Bivens*' scope renders the "context" analysis virtually useless as a limiting principle.

The specter of personal *Bivens* liability in such areas, moreover, inevitably leads officers to act with hesitation, rather than the decisiveness the situation may demand. That can have dire consequences in national emergencies. Pet. App. 98a-101a. "Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events." *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974). Officials in such situations "'should not err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502

U.S. 224, 229 (1991); *see Vance*, 701 F.3d at 200 (noting *Bivens* remedy would "make the Secretary of Defense care less about * * * the best military policy, and more about * * * his own finances").

Especially in times of national emergency, moreover, there is "need for prompt action, and decisions must be made in reliance on factual information supplied by others." *Scheuer*, 416 U.S. at 246. Even in mundane circumstances, "'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another.'" *United States* v. *Hensley*, 469 U.S. 221, 231 (1985). But the decision below subjects Hasty and Sherman—local jailers—to personal liability for following, rather than countermanding, FBI terrorism designations.

That *Bivens* theory threatens the very idea of chain of command. It cannot be that clearly established law requires jailers to make their own terrorism assessments in disregard of designations made by an agency with far more information and experience in terrorism-related matters. That holding invites chaos. As Judge Raggi explained in dissent, tragedy at the hands of incarcerated terrorists is not hypothetical. Two years before 9/11, a convicted terrorist known as the "Blind Sheikh" used his lawyer to evade security and to encourage renewed attacks. Pet. App. 137a. Another suspected terrorist attacked a prison guard with a pick, inflicting permanent brain damage. *Id.* at 137a-138a. Requiring jailers to ignore FBI terrorism assessments invites repetition of such tragedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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